2003

State of Utah v. James J. Quinn : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v.	:	Case No. 20030848-CA
JAMES J. QUINN, Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS OF DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS, A THIRD DEGREE FELONY, KEEPING AN OPEN CONTAINER IN VEHICLE, A CLASS C MISDEMEANOR, AND DRIVING WITHOUT A VALID LICENSE FOR THE CLASS OF MOTOR VEHICLE, A CLASS C MISDEMEANOR, IN THE FIRST JUDICIAL DISTRICT, CACHE COUNTY, THE HONORABLE CLINT S. JUDKINS PRESIDING

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ORAL ARGUMENT REQUESTED

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from convictions of driving under the influence of alcohol or drugs (DUI), a third degree felony under Utah Code Ann. § 41-6-44 (2001); keeping an open container in a vehicle, a class C misdemeanor under Utah Code Ann. § 41-6-44.20 (2001); and driving without a license for the class of motor vehicle, a class C misdemeanor under Utah Code Ann. § 53-3-207 (2001), in the First Judicial District, Cache County, the Honorable Clint S. Judkins presiding. This Court has jurisdiction over the appeal under Utah Code Ann. § 78-2a-3(2)(e) (2002).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

Did the trial court properly sentence defendant for third-degree felony DUI with prior convictions where the court, acting as trier-of-fact, had explicitly found every element of the crime and had conveyed, if not formally announced, its verdict?

No standard of review applies.

STATEMENT OF THE CASE

Defendant was charged with one third degree felony—driving under the influence of alcohol and/or drugs (DUI) within ten years of two or more prior convictions. R1-2. He was also charged with three class C misdemeanors—carrying an open container in his vehicle, driving a class of motor vehicle without being licensed in that class, and driving with defective equipment. *Id.* Defendant moved to dismiss the felony DUI charge, arguing that ex post facto and due process protections prohibited any enhancement of his conviction on the basis of his prior convictions. R33, 37-43. The parties filed memoranda on the motion. R37-43, 46-58. Following argument on the matter, the trial court denied the motion. R65-66, 69-72; MT.[1]

Defendant waived his right to a jury trial. R77, 79. On September 6, 2002, the trial court conducted a bench trial. R81-82, TT. The court found defendant guilty of the DUI. TT66. The court also found that the State had produced evidence of two convictions within the ten-year period preceding the DUI offense. *Id.*; *see also* R56-58, 81-83 One of the convictions, entered March 12, 1993, followed a trial. TT63; *see also* R58. The other, entered October 12, 1993, was based on a guilty plea. TT63; *see also* R56-57.

At the close of trial, defendant claimed that the State had the burden to show not only the fact of the previous convictions, but also that the guilty plea, upon which the

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[1] The transcripts in this case have not been assigned record numbers. The State therefore refers to the transcripts of the proceedings as MT (hearing on motion to dismiss), TT (trial), and ST (sentencing hearing).

October 1993 conviction was predicated, had been voluntarily entered. TT67-68. The Court found defendant "guilty of at least the lesser included offense of DUI," but reserved disposition of the third degree felony enhancement issue until the parties could brief defendant's burden of proof claim. TT67-68. The trial court set a hearing on the matter and sentencing for November 26, 2002. R.104. Defendant did not appear. R105.

Defendant was apprehended on a bench warrant and appeared at a hearing on September 4, 2003, almost one year later. R109-110. The court reset sentencing for September 15, 2003. R109. The trial court opened the sentencing hearing by stating, "I understand we have a third degree felony, driving under the influence. Driving with the wrong class of license and an open container. Any reason sentence should not be passed at this time?" ST2. Defense counsel responded, "No, Your Honor." *Id.*

The court then asked defense counsel, "Anything you or your client would like to say?" *Id.* Defense counsel responded, "Just that I've had the opportunity to review the presentence report with defendant in this particular matter. We would note to the court that the two prior DUI offenses occurred approximately nine-and-a-half years ago. This is a third DUI that did occur within the ten year statutory period." *Id.*

The court asked defendant if he would like to say anything. *Id.* Defendant said that he was sorry and took full responsibility for his actions. *Id.*

The court sentenced defendant to serve a prison term of no more than five years on the DUI charge and ordered concurrent ten-day jail sentences on the wrong class of license and open container charges. *Id.* at 3.

Defendant timely appealed. R117.

STATEMENT OF THE FACTS

Shortly after midnight on August 8, 2001, Sergeant Brett Randall of the Logan City Police Department saw defendant driving a blue car with the headlights off. TT3, 5. He also observed the passenger taking drinks from what appeared to be a beer can. *Id.* at 4. He turned on his overhead lights and pulled the car over. *Id.* at 4-5.

As he approached the car, he noticed that the driver was wearing only his boxer shorts. *Id.* at 5. A heavy odor of alcohol emanated from the vehicle. *Id.* The driver's speech was slow and slurred. *Id.* His eyes were bloodshot. *Id.* at 6. Officer Randall asked defendant to step out of his car. *Id.* at 8. He noticed that defendant swayed when he walked and had difficulty keeping his balance. *Id.*

Officer Randall asked defendant whether he had been drinking, and defendant said that he had drunk "two or three." *Id.* at 9. The officer assumed that defendant was referring to two or three beers. *Id.* The officer then informed defendant that he was going to give him some tests to determine whether or not it would be safe for him to drive home. *Id.* The officer performed various field sobriety tests, and defendant was unable to perform the required tasks. *Id.* at 9-17.

The officer then administered a breathalyzer test. *Id.* at 17. The portable breath machine registered positive for the presence of alcohol in defendant's breath, but because defendant could not or would not blow a breath of sufficient length, the officer could not get a proper alcohol level reading. *Id.* at 18. Based on his experience and observations, however, the officer determined that defendant was "[e]xtremely intoxicated"—

"intoxicated to the point that he couldn't safely operate a motor vehicle," and arrested him. *Id.* at 19.

Upon searching defendant's car, the officer found an open container of alcohol wedged between a seat occupied by defendant's passenger and the passenger-side door. *Id.* at 20. The officer later ran a check on defendant's driver's license and found that it had expired. *Id.* at 23.

SUMMARY OF ARGUMENT

The trial court properly imposed a sentence for third degree felony DUI with prior convictions. While the court did not formally announce its verdict, its uncontroverted informal statement, "I understand we are here on a third degree felony, driving under the influence," conveyed its verdict. All parties knew that the trial court had found every element of the felony DUI and only withheld a formal announcement of verdict to allow defendant to argue that the prior convictions could not be used to enhance his conviction. Defendant had abandoned his efforts to make that argument prior to sentencing, the argument was contrary to controlling law, and defendant does not reassert it on appeal.

As to his claim regarding announcement of the verdict, if any error occurred, defendant invited it when, prior to sentencing, he affirmatively represented to the trial court that there was no reason that sentence should not be passed on defendant's third degree felony conviction. Moreover, if defendant has any remedy, it is not vacation of his felony sentence and imposition of a misdemeanor sentence. At most, he is entitled to have the trial court formally enter a guilty verdict on the felony DUI charge and then sentence him again to the term it originally imposed.

ARGUMENT

THE TRIAL COURT PROPERLY IMPOSED A SENTENCE FOR THIRD DEGREE FELONY DUI WITH PRIOR CONVICTIONS; THE TRIAL COURT'S INFORMAL ANNOUNCEMENT OF ITS VERDICT SUFFICED TO SUPPORT THE CONVICTION

Defendant claims that his "sentence for [the felony] DUI was patently illegal in that [the trial court] sentenced him to a sentence consistent to that of a 3rd degree felony when defendant[] was only found guilty of a class B misdemeanor." Br. Appellant at 7. In making his claim, defendant suggests that he was acquitted of the felony charge. He was not. The record makes clear that the trial court and both parties understood that defendant was guilty of a felony. The only issue for this Court is whether the trial court's informal pre-sentencing announcement of defendant's guilt sufficed to support his conviction or whether the case must be remanded for formal announcement of the verdict.[2]

A. If any error occurred, it was only that the trial court did not more formally announce the verdict. Defendant invited that error, and this Court should therefore reject his claim.

Defendant claims that the trial court improperly sentenced him on a third degree felony because it "failed to rule on the enhancement from a class B misdemeanor to a 3rd degree felony." Br. Appellant at 7. If the trial court erred, defendant invited the error by affirmatively representing that there was no reason that sentence should not be pronounced. The court began the sentencing hearing with a statement and a question. "I

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[2] On January 20, 2005, the State moved for summary reversal on the basis that defendant was entitled to the benefit of a change in the law. On February 9, 2005, this Court denied the motion. The State does not re-address the issue in this brief.

understand we have a third degree felony, driving under the influence. . . . Any reason sentence should not be pronounced at this time." ST2. Defense counsel stated, "No, Your Honor." *Id.*

By that statement, defendant affirmatively represented that nothing more remained to be done before the court sentenced defendant on the third degree felony DUI. Defendant may well have done this because the trial court had informed him off-the-record that it was rejecting his argument that the State had the burden of proving that his prior conviction was based on a voluntarily-entered guilty plea. Where "a party through counsel has made a conscious decision to refrain from objecting or has led the trial court into error, [the appellate court] will then decline to save that party from the error." *State v. Bluff*, 2002 UT 66, ¶ 25, 52 P.3d 1210 (citing *State v. Bullock*, 791 P.2d 155, 158 (Utah 1989)). This Court should reject defendant's argument on this ground alone.

B. Defendant was not "only found guilty of a class B misdemeanor." Rather, the trial court clearly found him guilty of third degree felony DUI.

The record does not support defendant's claim that he was convicted of only a class B misdemeanor. Indeed, defendant acknowledged below that his conviction was for third degree felony DUI. As stated, the trial court's opening remarks at the sentencing hearing were "I understand we have a third degree felony, driving under the influence. . . . Any reason sentence should not be passed at this time?" ST2. Defense counsel responded, "No, Your Honor." *Id.* When asked whether he had anything to say, defense counsel observed, "This is a third DUI that did occur within the ten year statutory period." *Id.* That statement was a clear allusion to third degree felony DUI. Thus, at

sentencing defendant understood and acknowledged that his conviction was for a third degree felony.

Without acknowledging his concession below, defendant asserts for the first time on appeal that "[t]he trial court found [him] guilty of a DUI, a class B misdemeanor." Br. Appellant at 7. That assertion is not supported by the record, nor can it be inferred from the record. Defendant asks this Court to infer that the trial court acquitted him because the trial court's only announcement of its verdict was its statement, "I understand we have a third degree felony." ST2. Defendant thereby asks for an unreasonable reading of the record.

The court's findings at the bench trial refute defendant's claim that he was convicted of only a class B misdemeanor. The trial court found every element of felony DUI.

The version of the statute in effect at the time of the August 8, 2001 DUI offense provided:

> A person may not operate or be in actual physical control of a vehicle within this state if the person . . . is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating that vehicle.

Utah Code Ann. § 41-6-44(2)(a) (2001). The enhancement provision of the statute provided: "A conviction for a violation of Subsection (2) is a third degree felony if it is committed . . . within ten years of two or more prior convictions under this section." Utah Code Ann. § 41-6-44(6)(a) (2001).

The evidence presented at trial required the trial court, sitting as trier-of-fact, to make a credibility determination. The trial court credited Officer Randall's testimony that defendant was "[e]xtremely intoxicated"—"intoxicated to the point that he couldn't safely drive." TT19, 66. Based on this testimony, the court found defendant guilty of the August 2001 DUI. *Id.* at 66. Defendant has not challenged this finding.

The State also presented evidence of two prior convictions. One of the convictions, entered March 12, 1993, followed a trial. TT63; *see also* R58. The other, entered October 12, 1993, was based on a guilty plea. TT63; *see also* R56-57. The court found that the State had met its burden to present evidence of two convictions within the ten-year period preceding the August 2001 DUI offense. TT66.

As stated, however, defendant argued in closing argument that one of the prior convictions, the conviction based on a guilty plea, could not be used to enhance the August 2001 DUI. TT64. Defendant claimed that the State had the burden to show that his 1993 guilty plea was "freely and voluntarily" entered and "that all of the constitutional rights of the defendant were given to [him]" at the time he entered the plea. TT69, 73. Defendant claimed that the State had not met that burden. *Id.* at 64. Responding to that argument, the trial court found that the State had not introduced any evidence "as to the procedures that took place on the original trial court level at the municipal court." TT66.

The court, however, was not convinced that the State actually had the burden to introduce such evidence. The court stated that the argument was "new to me." TT 69. The court told defense counsel, "Now, what I'll do, Mr. Skabelund, if you want to pursue

that, I'll allow you to brief the issue. . . . The purpose for that is to determine whether or not it is a third degree felony or a lesser included offense of DUI[,] a class B misdemeanor. I found [defendant] guilty of the class B misdemeanor. It's whether or not he's guilty of the enhancement as well." TT67. The court further instructed, "I have found [defendant] guilty of *at least* the lesser included offense of DUI. So the argument is only as to whether or not it should be enhanced." TT67-68 (emphasis added).

The court then set sentencing for November 4, 2002. TT74. The court ordered that defendant report to Adult Probation and Parole (AP&P) for preparation of a presentence investigation report. *Id.* He ordered that AP&P "make recommendations as if the defendant were convicted of a third degree felony." *Id.* The court stated that it would consider the parties' pleadings on defendant's claim on November 4 prior to sentencing. *Id.*

Defendant filed a brief in support of his claim regarding the State's burden. R87-91. The State filed a response. R92-98. Defendant then filed a motion for continuance of sentencing so that he could file a reply to the State's response. R100. The trial court granted the motion. R104. The court set a hearing on the matter and sentencing for November 26, 2004. *Id.* Defendant never filed a reply. Moreover, defendant did not appear for sentencing. R105.

When defendant was apprehended on a bench warrant almost one year later, the trial court again calendared the sentencing hearing. R109-110. Sentencing proceeded, but defendant never again mentioned his claim that the State had an unmet burden to show that the prior guilty plea was voluntary and that defendant was advised of his

constitutional rights when he entered it. *See* ST. Rather, defendant acceded to the trial court's characterization of the matter to be decided, "I understand we have a third degree felony, driving under the influence," and agreed that there was no "reason sentence should not be passed." *Id.* at 2.

Defendant thus abandoned his claim. But even if he had not, he could not have prevailed. Defendant claimed that the State had the burden to show that his prior conviction was based on a "guilty plea that was made freely and voluntarily" and that "all of [his] constitutional rights . . . were given to [him]" when he entered the plea. TT 69, 73. Controlling precedent holds otherwise.

An attack on a prior conviction "is collateral by definition" when a defendant seeks "'to deprive [it] of [its] normal force and effect in a proceeding that [has] an independent purpose other than to overturn the prior judgments.'" *State v. Gutierrez*, 2003 UT App 95, ¶ 7 n.1, 68 P.3d 1035 (quoting *Parke v. Raley*, 506 U.S. 20, 30 (1992)). "On collateral attack, a plea entered with the benefit of counsel is 'presumed to have been voluntary' absent evidence demonstrating lack of voluntariness." *Id.* at ¶ 8 (quoting *State v. Branch*, 743 P.2d 1187, 1192 (Utah 1987)). Consequently, both this Court and the Utah Supreme Court have held that the burden is on the *defendant* in this situation to show that his plea was not knowingly and voluntarily entered. *See State v. Triptow*, 770 P.2d 146, 149 (Utah 1989) (holding that prior conviction is entitled to presumption of regularity and that defendant has burden to "produce some evidence" to show otherwise); *Gutierrez*, 2003 UT App 95 at ¶¶ 7, 11 (holding that "once the State has proven a prior conviction, a presumption of regularity arises, and the burden shifts to the defendant to

produce 'some evidence' of involuntariness"—"a transcript, testimony regarding taking of the plea, a docket sheet, or other affirmative evidence").

Here, defendant adduced no evidence that his prior guilty plea was not knowing or voluntary. Moreover, the record is clear that defendant had counsel when he entered his guilty plea and that he was advised of his constitutional rights. *See* R56-57. The guilty plea conviction therefore was presumed voluntary, and its use for enhancement purposes was proper. *Id.* at ¶¶ 8, 13.

C. Even if this Court should determine that the trial court erred, the remedy is not reversal of his felony conviction and entry of a misdemeanor conviction. Rather, the remedy is remand for entry of a formal verdict and judgment on the felony charge.

Even if this Court were to determine that the trial court erred when it did not more formally announce its verdict, defendant's remedy is not remand for imposition of a misdemeanor sentence. Rather, his remedy is remand for formal announcement of a guilty verdict on the third degree felony charge, for entry of a third degree felony conviction, and for imposition of an appropriate sentence on that conviction. *See People v. Lucatuorto*, 690 N.Y. S.2d 794, 796 (N.Y. Sup. Ct. 1999) (holding that "trial courts in criminal cases have the general inherent authority to correct their own mistakes," including, in the context of a bench trial, "the failure of the court to announce its verdict") (citation and internal quotation omitted).

CONCLUSION

Defendant's conviction should be affirmed. Alternatively, this Court should remand for formal announcement of a guilty verdict on the third degree felony, for entry

of a third degree felony conviction, and for imposition of an appropriate sentence on that conviction.

Respectfully submitted this 11th day of March, 2005.

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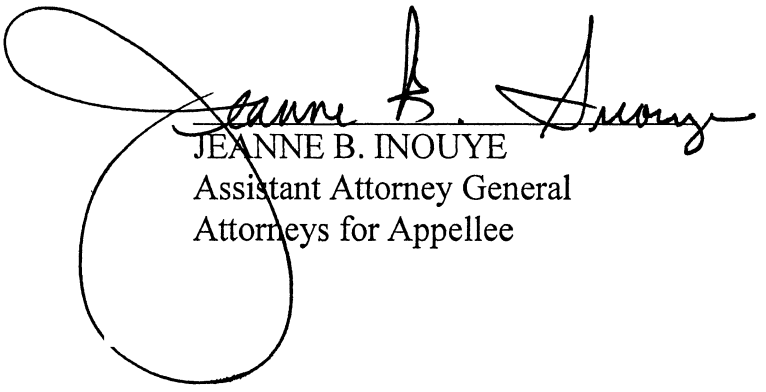

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2005, I either mailed first-class postage prepaid or hand-delivered two copies of the foregoing Brief of Appellee to appellant's counsel of record, as follows:

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